islators may faithfully represent the people, and promote their welfare."[13] "It will not be questioned, that it is entirely competent for the Legislature to provide for taking the vote of the people * * * * upon a measure directly affecting them, and if a given number be in favor of its adoption, to enact a law therefor carrying it into effect. And there would seem to be little difference in substance in a reversal of the process by first enacting the law in all its parts but providing that its operation is to be suspended until it be ascertained that the requisite number of the people to be affected by it are in favor of its adoption."[14]

The New Jersey court supports its decision of the validity of the statute before it upon the further, apparently well-taken, ground that "where there are two permissible views as to the existence of a constitutional limitation, one favorable and the other . . unfavorable, to a given statute, the courts must accord to the Legislature the right to hold that view of the Constitution which supports its enactment, even should the other view seem to the court to be the preferable one."

The principle that state constitutions should be submitted to popular ratification was not accepted by our first lawmakers, but it was approved at an early date and has become well settled.[15]

There is absolutely no consensus of opinion in the United States on the principle of discrimination between statute and constitutional law, and the practice of referring statutes to popular ratification would seem to constitute no real breach of our legal traditions.[16]

LIABILITY FOR DEFAMATORY STATEMENT IN A PETITION TO A GOVERNOR FOR A PARDON.

The Supreme Court of Texas in the recent case of *Connellee v. Blanton*[1] held that an application to the governor for a pardon was an absolutely privileged communication, and therefore no statement therein, although made with malice, would expose the

[13] *Locke's Appeal,* 72 Pa. St. 491, 496.

[14] *Bull v. Read,* 13 Crat. Va. 78, 88.

[15] Dodd, Revision and Amendment of State Constitutions, 65.

[16] Beard & Schultz, Documents on the State-wide Initiative, Referendum and Recall, 18, 19.

[1] 163 S. W. 404.

signer to an action for libel. The reasoning of the court is summarized in this statement from the opinion: "If the judicial proceedings which culminated in the conviction were absolutely privileged, why should not the same immunity be extended to the petition to a higher power to annul that judgment in part"?

The class of absolutely privileged communications is a very narrow one, and has in general been strictly confined to judicial proceedings,[2] legislative proceedings, and acts of state.[3] The reason for limiting the class so strictly is well stated in the case of *Maurice v. Wordin*:[4] "The doctrine of absolute privilege is so inconsistent with the rule that a remedy should exist for every wrong that we are not disposed to extend it beyond the strict lines established by a concurrence of decisions." The line however has not been so strictly drawn as to admit of no doubt on the classification of such a communication as formed the basis of the action in the Texas case.

A petition to the governor for a pardon is clearly not an act of the state. Nor does it fall within the class of judicial proceedings, which have been defined in reference to the question of absolute privilege, as proceedings carried on in a court of justice established or recognized by law, wherein the rights of the parties which are recognized and protected by law are involved and may be determined.[5] Under the class of legislative procedings are included words spoken by members during a session of the legislative body ,and in some jurisdictions memorials and petitions to the Legislature.[6] The cases holding that memorials and petitions to the Legislature are absolutely privileged rely upon the case of *Lake v. King*,[7] decided during the reign of Charles the Second.

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[2] The general rule in the United States courts is that the statements of parties, counsel, and witnesses made in the course of an action to be absolutely privileged must be pertinent and material to the case. *Smith v. Howard*, 28 Iowa 51; *Hoar v. Wood*, 3 Met. Mass. 193; *White v. Carroll*, 42 N. Y. 161. The English rule is that the exemption from liability is absolute. *Henderson v. Broomhead*, 4 H. & N. 569; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, affirmed L. R. 7 H. L. 744; *Seaman v. Netherclift*, 1 C. P. D. 540.

[3] 18 Am. & Eng. Ency. 1023; *Blakeslee v. Carroll*, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.

[4] 54 Md. 233 253.

[5] *Blakeslee v. Carroll*, 64 Conn. 223, 234.

[6] *Harris v. Huntington*, 2 Tyler Vt. 129; *Lake v. King*, 1 Saund. 131. *Wright v. Lathrop*, 149 Mass. 385, held that such a communication was only qualifiedly privileged.

[7] 1 Saund. 131.

The alleged libel in that case was contained in a petition to a Committee of Parliament, and it was held that no action would lie because it was in a court of justice, thus in effect deciding that such a petition was a judicial proceeding.

A petition to a governor asking for the removal of an officer,[8] and a petition to a fire-marshal to institute an inquiry as to the cause of a fire,[9] were held absolutely privileged on the ground that such petitions fell within the class of judicial proceedings. The weight of authority, however, is that a petition to the proper authorities regarding the conduct of public officers or relative to the appointment of public officers is only qualifiedly privileged, and is actionable if it contains defamatory matter and malice is alleged.[10] A communication to the governor of the state giving information to influence his action on a bill which had passed the Legislature was held only qualifiedly privileged.[11]

The petition to the governor for a pardon seems more analogous to those communications which have been held qualifiedly privileged. A study of the reasons given for allowing absolute privilege in the cases in which it has been allowed strengthens this view.

Absolute privilege is allowed in judicial procedings on the ground that justice requires that judge, advocates, and witnesses have their minds uninfluenced by fear of an action for defamation, that during a law trial advocates should not be embarrassed or enfeebled in their efforts by fear of subsequent litigation, that witnesses should be free to state what they believe to be the truth without being constrained to withhold anything through fear of an action for defamation.[12] Absolute privilege is accorded to legislative proceedings on the ground that matters relative to the government of the state should be debated freely without fear of litigation arising from words uttered in the heat of debate.[13] Acts of state are absolutely privileged for the same reason applied to legislative proceedings, namely, that there should be absolute

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[8] *Larkin v. Noonan,* 19 Wis. 82.

[9] *Newfield v. Copperman,* 15 Abb. Pr. N. S. N. Y. 360.

[10] *White v. Nicholls,* 3 How. U. S. 266; *Young v. Richardson,* 4 Ill. App. 364; *Gray v. Pentland,* 2 S. & R Pa. 23; see *Fairman v. Ives,* 5 B. & Ald. 642.

[11] *Woods v. Wiman,* 122 N. Y. 445.

[12] *Munster v. Lamb,* 11 Q. B. D. 588; *Kennedy v. Hilliard,* 10 Ir. C. L. 195.

[13] *Coffin v. Coffin,* 4 Mass. 1; *Dillon v. Balfour,* 20 L. R. Ir. 600.

freedom of action in matters concerning the government of the state.[14]

Neither unhampered justice nor efficient government require that a petition for a pardon, should be absolutely privileged. A pardon is not an act of justice, it is an act of mercy, exempting the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.[15] It would seem a sounder view to hold such a petition qualifiedly privileged only.

[14] *Spalding v. Vilas,* 161 U. S. 483; *Chatterton v. Secretary of State,* 2 Q. B. (1895) 189.

[15] *Moore v. State,* 43 N. J. Law (14 Vroom) 203, 241; *United States v. Wilson,* 7 Pet. 150.